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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re A.R., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

KEVIN R. et al.,

Defendants and Appellants.

D060331

(Super. Ct. No. EJ3133)

APPEALS from an order of the Superior Court of San Diego County, Laura J.
Birkmeyer, Judge. Affirmed.

Kevin R. and Renee M. (together, the parents) appeal a juvenile court order terminating their parental rights to their minor daughter, A.R., under Welfare and Institutions Code section 366.26.¹ The parents challenge the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception of section

¹ Statutory references are to the Welfare and Institutions Code.

366.26, subdivision (c)(1)(B)(i), did not apply to preclude terminating their parental rights. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2009, the San Diego County Health and Human Services Agency (Agency) filed a petition in the juvenile court under section 300, subdivision (b), alleging two-month-old A.R. was at substantial risk of harm based on Renee's substance abuse and a physical altercation that occurred between Renee and her roommate. Kevin is a registered sex offender, having been convicted in 1999 of lewd acts on a child under the age of 14. He spent nine and one-half years in prison for this offense, and a parole condition prevented him from having contact with children, including his own.

At the jurisdiction and disposition hearing, the court sustained the allegations of the petition, declared A.R. a dependent, removed her from parental custody and placed her in foster care. The court ordered reunification services for the parents. Kevin's parole condition was amended, at his request, to allow him supervised contact with A.R.

At the six-month review hearing, the court found the parents had not made substantive progress with their case plans. The court also found returning A.R. to the parents' custody would be detrimental to her, and there was no reasonable probability of return in the next six months. Kevin had been homeless and was living out of his car. He recently began having supervised visits with A.R. once a week for 90 minutes. A.R.

could not be placed with Kevin while he was on parole.² Renee had been incarcerated throughout most of the proceedings, and was recently sentenced to three years in prison. Even when she was not incarcerated, she rarely visited A.R. The court terminated reunification services for both parents and set a hearing under section 366.26 to select and implement a permanent plan for A.R.

Agency social worker Linda Johanesen assessed A.R. as both generally and specifically adoptable. A.R. was living with caregivers who wanted to adopt her. Although Kevin began visiting A.R. regularly after she had been in foster care for about seven months, he did not have a parent-child relationship with her that outweighed the benefits of adoption. In Johanesen's opinion, A.R. needed the safety, security and permanency that only an adoptive home could provide.

At the contested selection and implementation hearing, the court found, by clear and convincing evidence, A.R. was likely to be adopted. The court further found Kevin had regularly visited A.R., but there was no beneficial parent-child relationship to preclude terminating parental rights.

DISCUSSION

Kevin contends the evidence showed he had a beneficial parent-child relationship with A.R. because he regularly visited her, and she would benefit from continuing the relationship. Kevin asserts: he interacted with A.R. in a loving, attentive and appropriate way; he tried to alleviate or mitigate the reasons for A.R.'s dependency by working two

² Kevin's parole was set to expire on August 12, 2011, but he will remain a registered sex offender for life.

jobs to help support her; he complied with all of his parole conditions; and he fought to maintain regular visitation despite barriers placed in his way. Renee has no arguments of her own, but instead joins in Kevin's arguments to the extent they benefit her.

A

After reunification services are terminated, the focus of a dependency proceeding shifts from preserving the family to promoting the best interests of the child, including the child's interest in a stable, permanent placement that allows the caregiver to make a full emotional commitment to the child. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) At the selection and implementation hearing, the court has three options: (1) terminate parental rights and order adoption as the permanent plan; (2) appoint a legal guardian for the child; or (3) order the child placed in long-term foster care. (*Ibid.*)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the child under one or more of the enumerated statutory exceptions. (§ 366.26, subd. (c)(1)(A) & (B)(i)-(vi); *In re A.A.* (2008) 167 Cal.App.4th 1292, 1320.) "The parent has the burden of establishing the existence of any circumstance that constitutes an exception to termination of parental rights." (*In re T.S.* (2009) 175 Cal.App.4th 1031, 1039.) Because a selection and implementation hearing occurs "after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that

preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

Section 366.26, subdivision (c)(1)(B)(i), provides an exception to the adoption preference if terminating parental rights would be detrimental to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." We have interpreted the phrase "benefit from continuing the relationship" to mean a parent-child relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; accord *In re Jason J.* (2009) 175 Cal.App.4th 922, 936-937.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Jason J.*, *supra*, 175 Cal.App.4th at pp. 936-937.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment from child to parent. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

We review the court's finding regarding the applicability of a statutory exception to adoption for substantial evidence. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) In this regard, we do not consider the credibility of witnesses, resolve conflicts in the evidence or weigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is substantial evidence supporting a contrary finding. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) On appeal, the parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

B

Although Kevin regularly visited A.R., he did not meet his burden of showing there was a beneficial parent-child relationship sufficient to apply the exception of section 366.26, subdivision (c)(1)(B)(i). Kevin loves A.R. and was affectionate and appropriate with her during supervised visits. A.R. enjoyed seeing and playing with Kevin most of the time. However, Kevin never occupied a parental role in A.R.'s life. A.R. did not call Kevin "daddy" or recognize him as a father figure. She did not cry or say goodbye when visits were over, and she was not negatively impacted by the absence of Kevin from her daily life. To A.R., Kevin was a familiar or friendly visitor.

As time passed, A.R. began to lose interest in visits with Kevin. She whined when he picked her up, ignored him when he asked for a kiss goodbye, and pointed to the door instead of to Kevin when asked who her "da-da" was. On one occasion, A.R. turned her back on Kevin when he greeted her, grabbed her caregiver's leg and began to cry. She

refused to go near Kevin when he called out to her and she interacted very little with him, choosing to stay close to her caregiver or interact with the social worker. During other visits, A.R. looked for her caregiver and asked for her foster sister. A.R. tried to leave visits or end them early. When the caregiver and foster sister arrived to pick her up, A.R. squealed with delight and ran to them. She refused to give Kevin a kiss when he asked for one. The playful, loving and affectionate interaction Kevin describes was not enough to show A.R. has a "significant, positive, emotional attachment" to him such that terminating the parent-child relationship would result in great harm to A.R.³ (*In re Jason J.*, *supra*, 175 Cal.App.4th at pp. 936-937; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) "A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466; *In re Jason J.*, *supra*, at p. 937.)

Further, Kevin has not shown that maintaining a relationship with A.R. outweighed the benefits of adoption for her. At the time of the selection and implementation hearing, A.R. had been out of parental custody for more than two years and has had to depend on her caregivers to meet her daily physical, medical, developmental and emotional needs. The caregivers, who have an approved home study, are committed to adopting A.R. "The reality is that childhood is brief; it does not wait

³ We commend Kevin for his efforts to mitigate the reasons for A.R.'s dependency by working two jobs to help support her and for complying with his parole conditions. Nevertheless, these facts did not change the nature of the relationship between Kevin and A.R.

while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it." (*In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038.)

Although Kevin believes a permanent plan other than adoption would serve A.R.'s best interests, adoption is the only option that would provide A.R. with the stability and permanence she so desperately needs. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419 [Legislature has decreed guardianship is not in best interests of children who cannot be returned to their parents; only adoption affords the most permanent and secure alternative]; *In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368-1369 [parents' preference to preserve family unit does not override best interests of minor in stability and security of adoptive home].) The court was entitled to accept the social worker's opinion that the benefits of adoption for A.R. outweighed the benefits of maintaining a relationship with Kevin. We cannot reweigh the evidence or substitute our judgment for that of the juvenile court. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 53.) Substantial evidence supports the court's finding the beneficial parent-child relationship exception did not apply to preclude terminating parental rights.

C

Kevin's reliance on *In re S.B.* (2008) 164 Cal.App.4th 289, is misplaced. We are compelled to reiterate "*S.B.* is confined to its extraordinary facts." (*In re C.F.* (2011) 193 Cal.App.4th 549, 558.) In *S.B.*, the evidence showed that despite the minor's strong, positive, significant relationship with her caregiver, she would be "greatly harmed" by the loss of the equally significant, positive relationship she shared with her father.

Additionally, even after being apart from her father for a year, the minor remained strongly attached to him. (*In re S.B.*, *supra*, at pp. 300-301.) Here, Kevin has made no such showing, especially because his parole conditions and sex offender status prevented him from having custody of A.R. or having unsupervised visits with her. We once again emphasize there is an "unwarranted burden placed on this court and other courts by appellate counsel's reliance on *S.B.* when the facts are not even arguably similar." (*In re C.F.*, *supra*, at p. 559.)

DISPOSITION

The order is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.